

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMARJIT BAIDWAN & DAVINDER SINGH	:	DETERMINATION
		DTA NO. 823801
for Revision of a Determination or for Refund of	:	
Mortgage Recording Tax under Article 11 of the	:	
Tax Law for the Year 2006.	:	

Petitioners, Amarjit Baidwan and Davinder Singh, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law for the year 2006.

The Division of Taxation, by its representative Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion dated August 18, 2011, including the affidavit of Michelle M. Helm, Esq., dated August 18, 2011, with supporting documents, seeking summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5 and 3000.9(b). Petitioners, appearing pro se, had until September 19, 2011 to respond in opposition to the motion but did not do so. Thus, such date began the 90-day period for issuance of this determination.

After due consideration of the motion, affidavit and supporting documents, and all pleadings and proceedings had herein, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of mortgage recording tax as untimely filed.

FINDINGS OF FACT

1. On October 18, 2006, petitioners, Amarjit Baidwan and Davinder Singh, paid \$4,348.50 in mortgage recording tax.

2. On August 2, 2010, petitioners filed a claim seeking a refund of \$2,856.00 of the foregoing mortgage recording tax they had paid based upon their allegation that the amount of tax paid had been erroneously calculated.

3. On August 3, 2010, the Division of Taxation (Division) issued a letter denying petitioners' claim for refund on the basis that the same was not timely filed within the requisite period of limitation set by Tax Law § 263.

4. On August 18, 2010, petitioners filed a petition challenging the Division's denial.

5. The Division, in turn, filed the subject motion seeking summary determination on the premise that, regardless of the substantive basis upon which petitioners claim a refund, the claim itself was not filed within two years from the date of payment of the tax. Therefore, the Division argues that the relief sought by petitioners is barred by operation of law.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there

is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

B. The standard with regard to a motion for summary determination has been set forth numerous times. A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR" (20 NYCRR 3000.9[c]; *see also Matter of Service Mdse., Co.*, Tax Appeals Tribunal, January 14, 1999). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Moskowitz v. Garlock*, 23 AD2d 943, 944 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312 [1989]). Because it is the "procedural equivalent of a trial" (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [1989]), undermining the notion of a "day in court," summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 94 [1965], *aff'd* 26 AD2d 729 [1966]). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (*Gerard v. Inglese*, 11 AD2d 381, 382 [1960]).

C. Tax Law § 263(1)(a) provides that no refund of tax paid under Tax Law Article 11 (tax on mortgages) shall be allowed unless an application for refund is made within two years from the time the erroneous payment of tax was received. Here, it is undisputed that the tax was paid on October 18, 2006, but petitioners' claim for refund was not filed until August 2, 2010. Since petitioners' claim was filed more than two years after the tax was paid, such claim must be

denied as untimely as a matter of law. Accordingly, with no dispute as to the facts and no basis in law upon which to grant petitioners' claim, summary determination is granted in the Division's favor.

D. The Division's motion for summary determination is hereby granted, the petition of Amarjit Baidwan and Davinder Singh is denied, and the Division's denial of petitioners' claim for refund is sustained.

DATED: Troy, New York
October 27, 2011

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE